COMMONWEALTH OF KENTUCKY
IN SUPREME COURT
CASE NO.: 2015-SC-679

ELMER RIEHLE — **APPELLANT**

v.

CAROLYN RIEHLE — **APPELLEE**

APPELLANT'S BRIEF

On Discretionary Review from

Kentucky Court of Appeals

And

Hon. Linda Rae Bramlage, Boone Circuit Court, Second (Family) Division

CERTIFICATE OF SERVICE

Under Civ.R. 76.12(6) I certify the record was not withdrawn for preparation of this brief. I certify a copy of the foregoing Appellant's Brief was sent via Registered United States Mail or Regular United States Mail, postage pre-paid on this 9th day of March, 2016 to the following:

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INTRODUCTION

This case stems from the denial of a petition for dissolution where the Husband is disabled, under guardianship, and sought a divorce from his Wife, his guardian. Is there a fundamental right to divorce, and can a person under guardian be granted a divorce, and if so, can he go it alone, or require a special guardian to prosecute when his guardian is his spouse?

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument will assist the Court. There are unique issues presented in this Appeal, primarily, whether a disabled person can divorce his guardian who is also his spouse. And whether this Court should OVERRULE an 80 year old precedent preventing a committee or special guardian to pursue a divorce on behalf of the disabled person.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant, Elmer Riehle, was denied a divorce because he is under a disability. He has a legal guardian, his wife, Carolyn. (Ct.App.Dec. at 7-8) Elmer and Carolyn married in 1978. Elmer is 88 years old and Carolyn is 72 years old. (Id. At 2) Elmer receives a pension of approximately $200.00 per month. (Id.) Carolyn is trained as a nurse and worked full-time. (Id.) She would leave Elmer at home by himself while she worked.

In December 2008, after a disability trial, Carolyn was appointed Elmer's guardian by an Order of the Boone District Court. (Id.) Elmer has challenged the appointment in district court. After a subsequent hearing, a second Order appointing Carolyn guardian, was entered on March 21, 2012. (Ct.App. Appellee Br. At Appx. 2) Elmer became increasingly unhappy with the strict financial controls put in place by Carolyn. (Tr.Ct.Rec. at 104-105)

Elmer filed a petition for dissolution of his marriage in the Boone Circuit Court. (Tr.Ct.Rec. at 3-6) Carolyn filed a response contending Elmer had previously been adjudged incompetent by the Boone District Court, and she was Elmer's legal guardian and conservator. (Id. At 24-32) Elmer filed a verified motion for *pendente lite* spousal support and maintenance. (Id. At 16-23) A lengthy and thorough affidavit in support was filed in support of the motion.

Carolyn filed a motion to hold in abeyance, alternatively, motion to dismiss. (Id. At 24-32) Carolyn relied on ***Johnson v. Johnson***[1] and stated its general premise---an action for dissolution is strictly personal and volitional. (Id.)

The trial court directed the parties to file memoranda with the Court in support of their positions. (Tr.Ct.Rec. 33) The Court heard oral arguments. (Vid.Rec. 02/05/14) It entered an Order on February 18, 2014 holding *"based upon present state of law in Kentucky, an incompetent person cannot bring or maintain an action for dissolution of marriage in this State."* (Tr.Ct.Rec. 104) Citing the ***Johnson***[2] decision, it dismissed the divorce petition.

An appeal to the Court of Appeals follows. Elmer argued he had standing. He argued under an extension of the lucid interval doctrine, he Elmer could pursue a divorce. And, current divorce statutes contemplate a divorce being filed by someone other the married person. Finally, he argued public policy and equity call for Kentucky to adopt the modern, majority view permitting a disabled (ward) person to divorce his spouse.

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[1] **294 Ky. 77, 170 S.W.2d 889 (Ky. 1943).**

[2] **Id.**

The Court of Appeals issued a *published* decision declaring a person adjudicated to be disabled or incompetent may not divorce their spouse, who is also his guardian and conservator. *This is the first published decision in the Commonwealth on this specific issue of law.* The Court of Appeals noted,

> [a]s an intermediate appellate court, this Court is bound by the precedents of the Kentucky Supreme Court…The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court.[3]

(Ct.App.Dec. At 7-8)

This Court granted Elmer's motion for discretionary review. This brief in support follows.

ARGUMENTS

a. Standard of Review and Standing

This Court is asked to review the Boone Circuit Court's Order granting Carolyn's motion to dismiss Elmer's petition for dissolution. An appellate court reviews a motion to dismiss for failure to state a claim under a *de novo* standard.[4] It is purely a question of law before this Court.

Elmer has standing to bring this action. Elmer desires a divorce from his wife, Carolyn. This Court defines standing as "a requirement that a party have a judicially recognizable interesting the subject matter of the suit."[5]

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[3] (citing *Smith v. Vilvarajah*, 57 S.W. 839, 841 (Ky.App. 2000).)

[4] *Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010).

[5] *Harrison v. Leach*, 323 S.W.3d 702. 705 (Ky. 2010).

Elmer, though disabled, has recognized interest in this action because if a divorce is granted it would affect his legal rights to marry in the future and for there to be an equitable division of the marital estate in a dissolution proceeding.

b. A guardian cannot deprive a disabled person from seeking his statutory right to a divorce

Elmer married Carolyn before becoming "disabled" by a disability verdict in Boone District Court. They have been married for 38 years. (Tr.Rec. at 3) Both Elmer and Carolyn have a fundamental right to marry whomever they choose.[6] Likewise, each should have the right to terminate the marriage. Not all of a disabled person's civil rights are removed when they are adjudicated disabled. ***Our common law has not answered whether a disabled person loses the right to divorce.***

The guardianship statute, Ky. Rev. Stat. § 387.660(4), requires a guardian to act ***with respect to the ward*** in a manner that only *"limits the deprivation of civil rights and restricts his personal freedom* ***only to the extent necessary to provide needed care and services to him.***"[7] (emphasis added) A person has a fundamental right to marry another of his own choosing. It is an act of personal freedom. Likewise, any person must have the right to exercise his personal freedom to dissolve the marriage. Here Carolyn, as guardian, uses her power

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[6] ***Obergerfell v. Hodges,*** **135 SCt. 2584, 2604 (2015).**

[7] **Ky. Rev. Stat. § 387.660(4).**

over him to prevent him divorcing. She argues as guardian Elmer cannot divorce her because he is disabled.

Adjudicating a person disabled does not extinguish all of their rights found in the proverbial "bundle of sticks." The "insane person" [disabled] may get married in certain circumstances.[8] And the marriage between a disabled person is presumed valid.[9] A disabled person under guardianship can retain the right to vote. A disabled person may draft a Last Will and Testament.[10]

The General Assembly and common law evolution prevents a guardian from controlling all of the disabled person's affairs. A guardian may not approve the settlement of a civil action without Court approval.[11] A guardian may not sell property without the Court's approval. A guardian may not operate a business for the disabled person.[12] A guardian does not have the power to subject the disabled person to a surgery to donate a kidney.[13] ***Likewise, a***

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[8] *See, e.g., Beddow v. Beddow,* 257 S.W.2d 45 (Ky. 1953); *see also Littreal v. Littreal,* 253 S.W.2d 247 (Ky. 1952).
[9] *See, e.g.,* Cook *v. Cook,* 243 S.W.2d 900 (Ky. 1951).
[10] *See, e.g., Bye v. Mattingly,* 975 S.W.2d 451 (Ky. 1998).
[11] *See, e.g., LP Pikeville, LLC v. Wright,* 2014 WL 1345293 (Ky.App. 2014).
[12] *See, e.g., W.T.S. Strunk Co., v. Navarra's Committee,* 105 S.W.2d 1039 (Ky. 1937)
[13] *See, e.g., Strunk v. Strunk,* 445 S.W.2d 145 (Ky. 1969).

guardian should not prohibit the disabled person from obtaining a divorce, even if the spouse is the guardian.

Looking beyond our Commonwealth for guidance, sister tribunals acknowledge the right of a disabled person to avoid sterilization,[14] the right to not be institutionalized,[15] and this Court has permitted a disabled, incompetent to person to donate an organ.[16]

Here, Carolyn strenuously objects to Elmer getting a divorce. A guardian interfere with the disabled person's personal freedom by prohibiting a divorce. If divorce is a "personal decision" obtaining one is a "personal freedom" a guardian or a court of law and equity cannot prevent. The current absolute prohibition is a serious restriction on the personal rights of the individual. The Court of Appeals relied on primarily ***Johnson,*** **which** literally enforces *"until death do us part."* The failure to allow a divorce to go forward restricts one's right to a divorce in this Commonwealth. Stated another way, prohibiting divorce violates the disabled person's fundamental right to marry a person of their choosing.

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[14] *See, e.g., Skinner v. Oklahoma ex rel. William,* 316 U.S. 535 (1942)
[15] William A. Krais, *The Incompetent Developmentally Disabled Person's Right to Self Determination, Right-to-Die, Sterilization, and Institutionalization,* 15 AM.J.L.MED 333, n. 35 (1989).
[16] *Strunk v. Strunk,* 445 S.W2d 145 (Ky. 1969).

A guardian's appointment is not permanent or absolute.[17] A disabled person can move the Court to remove the guardian.[18] The absolute prohibition leads to an unreasonable result. A disabled person's decision to marry, before becoming disabled, can never be revered as the law states in this Commonwealth.

If dissolution is unavailable to a disabled spouse, Carolyn, the competent spouse, is vested with absolute, final control over the marriage. This creates a non-equitable situation the guardianship statutes unintentionally create. Retaining the arcane, draconian holding in ***Johnson***, leaves a disabled spouse without adequate legal recourse against potential physical, emotional, or financial abuse by the competent spouse.[19] ***Elmer remains a prisoner at the hands of Carolyn by means of the bands of matrimony.*** (Tr.Rec. at 20-23) This is untenable. This Court must reverse the trial court and appellate court and allow Elmer to pursue the divorce himself.

c. Kentucky law already abrogates the *Johnson* Holding

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[17] **See Ky. Rev. Stat. § 387.090.**

[18] **Id.**

[19] **See *Brockman v. Young*, No. 2010-CA-001354-MR, 2011 WL 5419713 (Ky. App. 2011).**

This issue was preserved for review in the trial court record at 52-59 and in the Appellant's Brief to the Court of Appeals.

The issue then turns to whether Elmer can bring the action to dissolve his marriage himself or whether it must be done by a special guardian or committee. The trial court and Court of Appeals applied the holding in ***Johnson v. Johnson*** to prohibit Elmer from pursuing the divorce at all. This Court can permit the divorce by Elmer individually or by a special guardian. It must overrule the *Johnson* decision. ***Johnson,*** holds, neither a disabled person nor a committee on the persons' behalf may bring an action for divorce.[20] The Court noted,

> **"the theory underlying the majority view is that a divorce action is so strictly personal and volitional that it cannot be maintained at the pleasure of a committee, even though the result is to render the marriage indissoluble on behalf of the incompetent."[21]**

At the time, the "majority rule" adhered to this flawed logic. ***Johnson*** was rendered in an era when the mentally ill and disabled lay at the hands of heath care professionals akin to Nurse Ratched in ***One Who Flew Over the Cuckoos Nest.*** At that time, the "English rule" and two states (Alabama and Massachusetts)

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[20] ***See, Johnson*** **at 78.**

[21] ***Id.***

permitted a committee to prosecute a divorce for a disabled person.[22] No-fault divorce did not even exist.

And Kentucky law did not provide a statutory means for the guardian or a committee to prosecute the divorce as noted in ***Johnson.*** Both family law statutes and guardianship statutes have modernized over the last seven decades. They now facially would permit a special guardian or committee to pursue a divorce for Elmer. It is time for this Court's jurisprudence on this important topic to enter the modern era.

Divorce is a creature of statute. Marriage is no longer so personal that it is only between the husband and wife. Our divorce statute permit parties other than the married couple to be added as necessary parties to the proceeding. Ky. Rev. Stat. § 403.150 states,

> 1) All proceedings under this chapter are commenced in the manner Provided in the Rules of Civil Procedure;
> 3) Either or both parties to the marriage may initiate the proceeding;
> 4) If a proceeding is commenced by one (1) of the parties, the other party must be served in the manner proscribed by the Rules of Civil Procedure and may file a verified response…;
> (6) ***The court may join additional parties proper for the exercise of its authority to implement this chapter.***[23]

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[22] ***See* Garrett *v. Garrett*, 114 Mass. 379 (Mass. 1874), *Campbell v. Campbell*, 5 So.2d 401 (Ala. 1941).**

[23] Ky. Rev. Stat. § 403.150

(emphasis added). Since 1972, our appellate courts permit employers,[24] corporations,[25] grandparents,[26] single member limited liability companies,[27] to be added to divorce proceedings under Ky. Rev. Stat. § 402.150(6). And the Civil Rules permit the appointment of a guardian ad litem to represent a person under a disability.[28] If grandma or grandpa, Brown Forman, or Eddyville Auto Parts, LLC, can be added to a divorce action, so can a special guardian or committee be added so Elmer can receive his much desired divorce.

The ***Johnson*** decision is abrogated by the family law jurisprudence regarding the addition of necessary or indispensable parties under Ky. Rev. Stat. § 403.150(6). This Court must so hold.

To permit a guardian or committee to be added to prosecute the divorce is a reasonable extension to allow disabled persons to divorce. And, a "disabled person" who may be unable to procure a next friend may institute the action in his name and the Court may appoint a next friend for him.[29]

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[24] *See, e.g., Ford Motor Co. v. Spainhauer,* No. 2008-SC-0000180-MR, 2009 WL 1108858 (Ky.App., April 23, 2009)
[25] *Id.*
[26] *See, e.g., Culver v. Culver,* 572 S.W.2d 617 (Ky.App. 1978)
[27] *See, e.g., Medical Vision PSC v. Philpot,* 261 S.W.3d 485 (Ky. 2008)
[28] Civ.R. 17.03(1)
[29] *See, e.g., McElrath v. Barnett,* 120 S.W.2d 216 (Ky. 1938).

The plain statutory language permits a guardian to pursue a divorce for the disabled person. The statutes plain meaning must prevail to prevent an unreasonable interpretation.[30] This Court cannot let another disabled person be neglected, abused, or fleeced of their assets like Mrs. Brockman.[31] Likewise, this Court cannot deny Elmer his desire to divorce and travel across the country in his twilight years. (Tr.Rec. at 19-23) Only this tribunal can find the modernization of family law and guardianship statutes already abrogate the ***Johnson*** holding. And only this tribunal can authorize the relief sought—allowing Elmer Riehle to divorce.

Moreover, Ky. Rev. Stat. § 387.300[32] permits a "next friend" to "prosecute an action" for a person who is under disability. In relevant part, it states,

> **(2) A guardian, curator, conservator or next friend who brings or prosecutes an action for a person who is under a disability is liable for the costs which during his conduct of the action, unless he be allowed to sue in *forma pauperis* or by an order of the court.**

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[30] *See, e.g., Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).
[31] *See generally,* **Brockman,** No. 2010-CA-001354-MR, 2011 WL 5419713.
[32] **There are three different sets of guardianship statutes. They are unclear as to whom they apply. There is nothing in the plain language to prevent Ky. Rev. Stat. § 387.300 to apply to disabled persons such as Elmer Riehle.**

The language of this statute is broad. One can reasonably construe "action" to include a divorce. Ky. Rev. Stat. § 387.300 was first adopted after the ***Johnson*** holding in 1952.[33]

Based on the family law and guardianship statutes applicable herein, the time has come for this high court to overrule ***Johnson*** decision. The General Assembly has made it null by the modernizing the family law statutes and the guardianship statutes applicable today.

When applied together, a next friend may commence a suit on behalf a disabled person and that person is a necessary party to the divorce under Ky. Rev. Stat. § 403.150(6). And in unique situations such as the one here, the disabled person is not prevented from filing the action alone and requesting the Court to appoint a next friend.[34]

Elmer moves this Court to apply the family law and guardianships statutes together to permit him to prosecute the divorce himself or to re-instate the divorce action with direction to the circuit court to appoint a next friend to prosecute the divorce on his behalf. Affirming ***Johnson*** permits none of these reasonable results.

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[33] It appears there was a comprehensive updating and amendment of the guardianship statutes during the 1982 General Assembly.
[34] Civ. R. 17.03

d. As a matter of public policy, Kentucky must join the majority and permit a disabled person to divorce by adoption a common law exception

This issue was preserved for review in the trial court record at 52-59 and in the Appellant's Brief to the Court of Appeals.

If this Court determines the statutory construction calls for the reversal of Johnson, public policy also supports this remedy and result. At the time ***Johnson*** was decided, the former Court of Appeals adopted the then majority view at the time—prohibiting a disabled person from being divorced at all. It was a *per se* prohibition. That holding is no longer the majority review. Only ten states, including Kentucky, retain the ***per se*** prohibition.[35]

In 1943, only Alabama and Massachusetts allowed an incompetent person to divorce. Between 1950 and today, seventeen states have either found the right to divorce within their respected guardianship statutes, or judicially created exceptions to the ***per se*** prohibition. The breakdown on this by states are: 10 states retain the per se prohibition; over 17 states permit a disabled person to divorce; and 15 states have not addressed the issue.[36] Appellate courts in the 17 states have adopted one of four common law exceptions or rules permitting a

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[35] **Arkansas, Georgia, Iowa, Montana, Nebraska, New York, Kansas, North Carolina, and Vermont retain the per se rule.**

[36] *See* **Chart in Appendix.**

guardian to prosecute the divorce for the disabled person. Until now, Kentucky trial courts and the appellate court are bound to the minority rule. (Tr.Rec. at 104-106, App.Ct.Dec. Passim)

Johnson was never favorably cited until 2010 until the Court of Appeals relied on it in ***Brockman.*** This Court in over seven decades has never reviewed the precedential value of ***Johnson***. Meanwhile, the majority of states reviewing the hard line ***per se*** prohibition have consistently moved away from it, adopting one of the four common law exceptions.

The Court of Appeals' unpublished decision in ***Brockman*** provides a recent example of how the ***per se*** prohibition is unreasonable today. It leads to unreasonable and unjust results. It is simply unjust and untenable. The guardian exploited his wife and the Cabinet for Health and Family Services were involved to investigate elder abuse and abandonment. The spouse fled to Florida to escape criminal prosecution.[37] Judge Thompson's dissent showed frustration in keeping the ***per se*** prohibition.[38] The Court of Appeals was bound by ***Johnson*** and could not divorce a disabled person from his spouse/guardian.

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[37] ***Id.*** **at ** 1, 2**

[38] ***Id.*** **at * 5**

The Court of Appeals was bound by ***Johnson*** and could not grant the divorce. ***Brockman*** was not appealed to this Court for review.

This case provides a different, admittedly less egregious, set of facts but another persuasive reason why ***Johnson*** must be overruled. Or an exception adopted allowing trial courts to proceed in unique circumstances. Elmer absent unambiguously wants a divorce. He retained counsel, verified a divorce petition, appeared at court proceedings, and provided reasons through an affidavit why he wanted spousal support and maintenance. (Tr.Rec. 3-6, 7-8, 16-23) He understood and assisted in the proceedings. Preventing Elmer from getting divorced, or even worse, preventing an abused and abandoned spouse to remain married forever violates common sense, a person's civil rights, and applies the guardianship statute in an illogical manner absent intervention by this Court.

Sister courts across the country have adopted four common law rules or exceptions to the hard line ***per se*** prohibition.[39] They are: 1) evidence of intention approach; 2) best interest approach; 3) the statutory approach; and the 4) substituted judgment approach. States have blended the exceptions depending on the factual circumstances of each case to permit the disabled person to

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[39] ***See,*** **Kurt X. Metzmeier,** *The Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend,* **33 UN.LOUISVILLE J.FAM.L. 949.**

divorce. What is consistent throughout is the modern trend and rule to allow a disabled person to divorce.

i. Evidence of Intention Approach Exception

The modern rule most applicable here is the *evidence of intention approach.* Courts in Ohio, South Carolina, New Jersey, Oregon, Pennsylvania, Tennessee, and Texas have all applied this exception and permitted a disabled person, a committee, or a special guardian to pursue the divorce.[40] The exception looks for evidence of intention to determine whether the disabled person's intent is to divorce their spouse.

In the Ohio,[41] New Jersey, [42] and Texas[43] cases, the disabled person had filed for divorce prior to being adjudicated disabled. The Court could glean from the pleadings and testimony the disabled person intended to receive a divorce. The appellate courts found since the disabled person intended to divorce (and was in their best interest) a divorce could be granted. In ***Kronberg***, the New

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[40] *See, e.g., Boyd v. Edwards,* 4 OhioApp.3d 142, 446 N.E.2d 1151 (1982), *Murray by Murray v. Murray,* 426 S.E.2d 781 (S.C. 1993), *Kronberg v. Kronberg,* 623 A.2d 806 (N.J.Sup.Ct.Chan.Div. 1983), *In Re Ballard,* 762 P.2d 1051 (Or.Ct.App. 1988), *Syno v. Syno,* 594 A.2d 307 (Pa.Super.Ct. 1991), *Turner v. Bell,* 198 enn. 232, 279 S.W.2d 71 (1955), *Wahlenmaier v. Wahlenmaier,* 750 S.W.2d 837 (Tx.App.Ct. 1988).

[41] *See,* Boyd, 446 N.E.2d 1151.

[42] *See generally, Kronberg,* 623 A.2d 806.

[43] *See,* Wahlenmaier, 750 S.W.2d 837.

Jersey Chancery Court held, a divorce was no more personal than a decision to withhold medical treatment.[44]

The Texas Court of Appeals in ***Wahlenmaier*** allowed evidence and testimony from family members about discord in the marital relationship. The Court found a disabled person could divorce and had disabled person had the same constitutional rights as a "sane" person.[45] Likewise, here, Elmer's intent is clear he wants a divorce. On his own, he retained an attorney, filed a verified divorce petition, file a motion for spousal support and maintenance with a supporting affidavit, and assisted in the prosecution of the case. (Tr.Rec. 3-6, 7-8, 16-23 The evidence is clear Elmer wants a divorce and his rights should not be different because he is "disabled."

The Pennsylvania Superior Court in ***Syno v. Syno,***[46] permits a disabled person to bring an action for divorce where the disabled person is capable of exercising reasonable judgment as to their personal decisions, understands the nature of the action, and is able to express unequivocally the desire to dissolve the marriage. Frank Syno, adjudicated disabled, filed a petition for divorce. The Court determined he was unable to manage his financial affairs. The Court did

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[44] *See generally,* ***Kronberg,* 623 A.2d 806..**

[45] *See generally,* ***Wahlenmaier,*** 759 S.W.2d.

[46] **406 Pa. Super. 218, 594 A.2d 307 (1991).**

not permit him to proceed with the action under his own name, but he could have a guardian appointed to him to complete the divorce proceeding. His guardian, a bank, was ordered to prosecute it on his behalf.

Six decades ago, in ***Turner v. Bell,***[47] the Tennessee Supreme Court held a disabled person could be divorced by an action filed by the guardian. Applying the *evidence of intention exception*, the Tennessee Court held if a disabled person can give credible evidence of his desire to be divorced it can proceed. The Court left as a factual, case by case inquiry for the trial court to determine the disabled person's level of competency. It noted it was a case by case basis for the trial court to determine.

The *evidence of intention rule* is applicable here. The facts in the trial court record can provide evidence of his intention to divorce, the divorce must proceed. The record in case has ample evidence Elmer Riehle wants a divorce. He moves the Court to adopt the evidence of intention rule and allow his divorce to be re-instated and completed.

ii. Best Interest Approach

The *best interest approach* has been utilized by several states to permit a disabled person to divorce his spouse. Florida, Colorado, Massachusetts,

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[47] **198 Tenn. 232, 232 S.W.2d 71 (Tenn. 1955).**

Washington, Hawaii, New Mexico, Connecticut, and New Hampshire at times have utilize the best interest approach when determining whether a disabled person can divorce.[48] The *best interest rule* is used primarily when a disabled person's intentions to divorce cannot be determined. The *best interest approach* is primarily focused on the protection of the disabled person's assets.

In ***Nelson v Nelson***[49], the New Mexico Court of Appeals adopted the *best interest approach* as a matter of first impression. The New Mexico guardianship statute did not specifically ordain the guardian with the power to file a divorce.[50] The disabled spouse had been neglected for some time.[51] And the trial court had chosen another family member over the spousal preference as guardian. [52]

The New Mexico court analyzed the broad guardianship statute and prior statements by the disabled wife that she desired a divorce. Coupled with the

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[48] *See, e.g., Vaughn v. Guardianship of Vaughn*, 648 So.2d 193 (Fl.App.Dist.5 1994), *Cox v. Armstrong*, 122 Colo. 277, 221 P.2d 371 (1950)(involved an annulment and not divorce), *Garnett v. Garnett*, 114 Mass. 379 (1874), *In Re Marriage of Gannon*, 104 Wash. 2d 121, 702 P.2d 456 (Wash. 1985), *McGrew v. McGrew*, 9 Haw. 475 (Haw. 1894), *Luster v. Luster*, 17 A.3d 1068 (Conn.App. 2011), *In re Salesky*, 157 N.H. 698, 958 A.2d 948 (2008).

[49] 118, N.M. 17, 878 P.2d 335 (1994).

[50] *Id.* At 337.

[51] *Id.*

[52] *Id.* at 336.

allegations of abuse and neglect, the appellate court adopted the *best interest exception* to permit the guardian to seek a divorce for the disabled person.[53]

The facts in ***Brockman*** are akin to those leading the New Mexico Court of Appeals to analyze the facts leading to the adoption the b*est interest approach* to permit the divorce.

iii. Substituted Judgment Exception

The *substituted judgment exception* requires an examination of evidence of the disabled person's intent. Instead of an exception, it disregards the ***per se*** prohibition entirely. It creates a new rule based on a court's desire to ascertain the best interest of the disabled person.

The Arizona Supreme Court[54] utilized the *substituted judgment exception* because there was evidence of the disabled wife's intentions before she became incompetent. That Court also provided an evidentiary standards for lower courts. The principle duty of the guardian is to provide the court any all evidence, from third parties, the disabled, or the guardian themselves, that would be admissible to prove the disabled's intent to divorce or not.[55] The Court then determines whether the divorce should proceed. It is highly factual inquiry

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[53] *Id.* at 339-340

[54] *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674 (Az. Ct. App. 1993).

[55] *Id.* at 682.

where the Court's judgment overrules the feelings of the disabled person and potentially the guardian.

Here, if applying the *substituted judgment exception*, there is evidence of the Elmer's intent now to be divorced. His prior unsuccessful attempts to set aside the guardianship proceedings provide first hand evidence of his intent to remove himself from Carolyn's direction and control. The trial court could determine whether based on the totality of the circumstances, intent having no weight, a divorce should be granted.

iv. Statutory Approach

Under the *statutory approach*, courts construe the divorce and general guardianship statutes to give guardians the power to act for the disabled in divorce proceedings, unless there is an explicit limitation on the guardianship power. Most of the majority view states have moved away from the ***per se*** prohibition and looked to their family law and guardianship statutes to allow a disabled person to divorce through their guardian. This Court should move in that direction as well.

Some state statutes permit the guardian outright to file the divorce for the disabled person. In Alaska, "[a] guardian may not prohibit the marriage or

divorce of the ward."[56] Early courts, ours for example, took the position the General Assembly could not have possibly contemplated that guardianship statutes would allow guardians to purse divorces.

Kentucky Revised Statute section 387.300 is not as straightforward as Alaska's statute, but does permit a guardian or committee to pursue an action for a disabled person. It states,

> **(1) No person shall sue as next friend unless he reside in this state and be free from disability, nor unless he file his own affidavit showing his right to sue as next friend according to the provisions of this chapter.**
>
> **(2) A guardian, curator, conservator or next friend who brings or prosecutes an action for a person who is under disability is liable for the costs which accrue during his conduct of the action, unless he be allowed to sue in forma pauperis or by an order of the court.**

It too was adopted after the ***Johnson*** decision.[57] On its face, it does not prohibit an action by a next friend to pursue a divorce. But, without overruling Johnson, any litigant bringing a divorce will fun against Johnson's holding. This Court can utilize the statutory approach exception and analyze the words "*an action for a person who is under disability*" to include a divorce action. The result would require Elmer to petition the Circuit Court for a next friend to be appointed on this behalf to pursue the divorce. Or the Court could remand the

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[56] Alaska Code § 13.26.150(e).

[57] It was adopted in 1952 and subject to amendments by the General Assembly in 1976 and 1982.

case to the Boone Circuit Court with direction to re-instate the action and appoint a next friend under Kentucky Revised Statute section 387.300 to complete the dissolution proceeding for him.

Elmer moves the Court to overrule the ***Johnson*** and permit him to divorce Carolyn. Any of the exceptions are applicable and of adopted by this Court will permit Elmer to receive the divorce.

Courts analyze more broadly powers given in guardianship statutes in response to right-to-die and health care surrogacy movements. It is easier for state courts to find the power to divorce if not specifically articulated in the plain language.[58] And "no-fault" divorce makes the act of receiving a divorce much less than personal than in the 1950s and 1960s.[59] The modern trend and rule is to permit a disabled person to divorce and not be held hostage by the bonds of matrimony.

CONCLUSION

In summary, this Court is called upon to vacate and overrule the hardline per se ruling preventing Elmer Riehle from getting a divorce. This Court can find he has a legal right to go it alone, or adopt any of the exceptions explained and applied in the majority of states and permit a guardian to pursue it for Mr.

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[58] *See* **Metzmeier, *supra*, note 40.**

[59] ***Id.***

Riehle. In any event, society has changed and so has the plain language of the statutes even in this Commonwealth. Only this Court can overrule the seventy year old precedent in Johnson and permit the Boone Circuit Court and others to permit Elmer and others similarly situated to not be held hostage as a disabled person by the bonds of matrimony alone.

Respectfully submitted,

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